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15 Attorneys for Plaintiff,
16 KENMARK VENTURES, LLC

17 **UNITED STATES BANKRUPTCY COURT**
18 **DISTRICT OF NEVADA**

19 In re:

20 ANTHONY THOMAS and WENDI
21 THOMAS,
22 AT EMERALD, LLC,
23 Debtors.

Case No. BK-N-14-50333-BTB
Case No. BK-N-14-50331-BTB

Chapter 11

[Jointly Administered]

**JOINDER IN MOTION TO APPOINT
CHAPTER 11 TRUSTEE**

Hearing Date: August 22, 2014
Hearing Time: 11:00 a.m.

24 KENMARK VENTURES, LLC ("Kenmark"), through its counsel Wayne A. Silver, hereby
25 joins in the motion of John Beach, Trustee of the Beach Living Trust Dated January 22, 1999
26 ("Beach Trust") to appoint a Chapter 11 Trustee in the above captioned cases of ANTHONY
27 THOMAS and WENDI THOMAS ("Thomas"), and AT EMERALD, LLC ("AT Emerald").

28 1. Kenmark is a California limited liability company doing business in Santa Clara
County, California.

2. Kenmark filed a Proof of Claim (Claim No. 7) in the Thomas's above-captioned

1 Chapter 11 case on June 12, 2014 in the amount of \$4.5m. Kenmark also filed a Proof of Claim in
2 the AT Emerald Chapter 11 case on June 30, 2014 (Claim No. 3) in the amount of \$4.5m. The Court
3 is requested to take judicial notice of these Proofs of Claim.

4 3. Kenmark filed an adversary proceeding against the Thomas Debtors on May 31,
5 2014, Adv.Pro.No. 14-5022, seeking a judgment in the mount of \$4.5m plus interest and attorneys'
6 fees, and a declaration that such judgment is non-dischargeable under 11 U.S.C.§523(a)(2). The
7 Court is requested to take judicial notice of the Adversary Complaint. The Adversary Complaint
8 alleges Anthony Thomas made a number of false representations to Kenmark's principals to induce
9 Kenmark to loan him and a related entity in excess of \$6.0m.

10 4. Kenmark is informed and believes the Thomas and AT Emerald Debtors dispute the
11 Proofs of Claim however, are not aware of the grounds of the alleged dispute. No objections to the
12 Proofs of Claim have been filed.

13 5. AT Emerald scheduled one secured creditor (Beach Trust) and one unsecured creditor
14 (Sarasota Vault), and each filed a proof of claim. Kenmark was not scheduled however, as noted
15 above, was able to file a claim. No other creditors filed claims. Beach Trust and Kenmark hold
16 99.9% of all claims in the AT Emerald bankruptcy case.

17 6. Thomas scheduled \$1,262,568 in unsecured claims, and once again failed to list
18 Kenmark however, as noted above, Kenmark was able to file a claim. Proofs of claims total
19 \$4,987,183. Beach Trust and Kenmark hold 92% of all claims in the Thomas bankruptcy case, and it
20 is likely several of the remaining claims are insider claims subject to avoidance or subordination.

21 7. Kenmark does not believe the Thomas and AT Emerald Debtors are capable of
22 fulfilling their fiduciary duties as debtors-in-possession. Anthony Thomas has failed to maintain
23 communication with his attorneys leading to a motion for their withdrawal, and has failed to keep
24 this Court and the creditors up to date on the status of the sale. The sole asset of these bankruptcy
25 estates is the Thomas Emerald, which is uninsured. Although the Thomas and AT Emerald Debtors
26 have represented to this Court that the Thomas Emerald has been sold for a sum sufficient to pay all
27 creditors in full, this Court has not been provided with any verifiable evidence that the alleged buyer
28

1 has the financial resources to close the transaction or has even completed due diligence¹.

2 8. Kenmark, Beach and this Court are being held hostage by this shadowy deal that is
3 almost on the verge of closing but somehow never does. And like any number of other fraudulent
4 schemes, we are warned any attempted investigation into the deal is cause for cancellation of the
5 deal.

6 9. The AT Emerald Motion to Sell Assets Free and Clear of Liens and Motion to File
7 Purchase and Sale Agreement Under Seal filed with this Court on June 23, 2014 as Doc.No.83,
8 stated on p.2:24 – p.3:3 that:

9 The purchase price is to be paid in cash, within three days following
10 entry of an order approving the sale or three days following the
11 inspection and acceptance of the Emerald by [Buyer]². The Agreement
12 provides that [Buyer] shall have eleven days following execution of
13 the Agreement to approve the condition of the Emerald, and that the
14 Debtor shall have ten days following execution of the Agreement to
15 confirm that [Buyer] has sufficient cash to consummate the
16 transaction. By the date of the hearing on this Motion, both conditions
17 will likely have been satisfied, as the Agreement was executed on June
18 19, 2014 and the conditions are required to be met not later than June
19 30.

16 10. The Agreement was executed on June 19, 2014 (Ex. “A” to the Declaration of
17 Anthony Thomas filed on June 23, 2014, Docket No. 88 in the Thomas bankruptcy). The Order
18 approving the sale was entered on July 23, 2014 (Docket No. 142 in the Thomas bankruptcy). No
19 amendments or modifications to the Agreement have been filed with the Court or shown to
20 Kenmark. The deadline for the Debtor to confirm the buyer has sufficient cash to close the deal was
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22 ¹ Kenmark notes the August 8, 2014 letter from David C. Clarke attached as Exhibit Two to the
23 Declaration of John Beach in support of the motion fails provide any credible evidence of
24 financial wherewithal. Thus letter also contains disturbing language threatening to cancel the deal
25 on a whim and characterizing this transaction as a “purely private matter between Koyo and Mr.
26 Thomas”. Moreover, this letter states: “I am really not at liberty to disclose any further details on
27 the financial arrangements between the parties.” To the extent Mr. Thomas has information about
28 the “financial arrangements between the parties”, status of the sale and bona fides of the buyer,
this information should be presented to the Court and creditors forthwith.

² Buyer’s name has been redacted pursuant to prior orders to seal this information.

1 June 30th. The Buyer alleges that has been done as of August 8, 2014 (Declaration of John Beach,
2 Ex. Two), however there is nothing in the Court record to substantiate that. Nor is there anything in
3 the Court record to confirm the buyer has completed due diligence.

4 11. Where there is doubt about management's ability to carry out its fiduciary duties,
5 appointment of a trustee is the appropriate remedy. Bankruptcy Code section 1104(a)(2) authorizes
6 the appointment of a trustee where such is "in the interests of creditors, equity security holders, and
7 other interests of the estate." In exercising the considerable discretion the Court has in deciding the
8 motion insofar as it rests on this subsection, the Court should engage in a fact-driven analysis,
9 principally balancing the advantages and disadvantages of taking such a step, and mindful of the
10 many cases, noted above, that have held that appointment of a trustee is an extraordinary remedy,
11 and should be the exception, rather than the rule. *Adelphia Communs. Corp.*, 336 B.R. 610 (Bankr.
12 S.D.N.Y. 2006)

13 12. Thomas's and AT Emerald's failure to communicate with counsel, failure to disclose
14 the terms and status of the alleged sale, refusal to allow inspection of the Thomas Emerald, lack of
15 details about the sale, and recent letter from the [Buyer], all point to a lack of credibility and failure
16 to attend to the duties of a debtor in possession. A Chapter 11 trustee can investigate the condition
17 of the Thomas Emerald and the status of the sale, and if necessary search for an alternate buyer.

18 13. Beach Trust and Kenmark are the creditors holding the vast majority of claims, and
19 Kenmark joins with Beach Trust in its belief appointment of a Chapter 11 trustee is appropriate and
20 in the best interest of creditors.

21 Dated: August 19, 2014

/s/ Wayne A. Silver

Wayne A. Silver, attorney for KENMARK
22 VENTURES, LLC
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